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Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 485.

ROSE W. SHAIN,
Petitioner,

v.

MARK SHAIN,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FREDERICK W. MANSFIELD,
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Statement of the Case.

This is a petition for the issuance of a writ of certiorari to review the decree of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on the *16th of September, 1949* (not September 19, 1949, as stated in the petition, pp. 1 and 2), affirming the decree of the Probate Court of Norfolk County, Commonwealth of Massachusetts, which sustained the respondent's plea to the jurisdiction based on the validity of a Nevada divorce and dismissed the petition of the petitioner herein for separate support.

We adopt the statement of facts as contained in the petition with the following additions and corrections:

The respondent testified in the Nevada divorce proceedings that he had his name listed as an attorney at law in

Boston because Mrs. Shain (the petitioner) and her family propagated a rumor that he had been disbarred, and to avoid any questions and embarrassment he listed his name as an attorney at law (R. 44).

The respondent definitely established a domicile in New York City during the year 1931 and lived there until 1938. He voted in the City of New York for the years 1932 through 1936 (R. 10). He left New York City early in the year 1938, because of ill health, and went to Florida with the intention of establishing a domicile in that state. He established his domicile in the State of Florida in 1938, and lived there until September, 1940 (R. 11).

A copy of the "Voter's Registration of Qualified Voters, Miami Beach, Florida," shows Shain was a qualified elector in that city on March 21, 1939 (R. 11).

The respondent arrived in Reno on September 6, 1940, where he resided at the Parkway Hotel continuously until November 1, 1940 (R. 11).

During the interval between November 1, 1940, and June 18, 1941, at the suggestion of his physicians, the respondent left Reno on November 1, 1940, and, except for a few days in Nevada on three occasions, he traveled and visited extensively in southern California, Florida and Cuba (R. 14).

During his absence the respondent, on April 10, 1941, met with an accident which incapacitated him for some time (R. 13).

The Probate Court found that the respondent's health was poor, that he had been advised to seek a warm climate, and that he traveled since November 1, 1940, for the purpose of improving his health; that he was desperately trying to recover good health (R. 14).

The Probate Court also found that the respondent's absence from Reno between November 1, 1940, and June 18, 1941, "was expedient"; that on and after November 1,

1940, Shain (respondent) intended in good faith to return to Reno without delay and to continue his residence therein, and that he had continued his residence therein until the present; that on September 6, 1940, the respondent had given up his domicile in Massachusetts, New York and Florida; that he had never given up his Reno residence which he established on September 6, 1940, and that he had not acquired a new domicile; that he was a bona-fide resident (in good faith) of Reno on July 2, 1941, with a right, at that time, to file a complaint for divorce in the State of Nevada, and that the Reno divorce entered on August 12, 1941, was valid (R. 24).

The Supreme Judicial Court for the Commonwealth of Massachusetts found that the residence requirements of Section 6405 of the Nevada statutes were in truth complied with in that the judge of the Probate Court had found "on all the evidence" the husband's (respondent's) absence from Reno between November 1, 1940, and June 18, 1941, "was expedient" and that on and after November 1, 1940, the respondent intended in good faith to return to Reno without delay and to continue his residence therein; that, since the evidence on which this finding was made was not before them and the finding is not necessarily inconsistent with the subsidiary findings, that finding must stand; that the words "without delay," as contained in the Nevada Compiled Laws (1929), Section 6405, must be construed with considerable flexibility and with some reference to the reasons for absence; that one in search of health might actually "absent" himself for considerable periods and still entertain an intention in good faith to return without delay (R. 55, 56).

The Supreme Judicial Court for the Commonwealth of Massachusetts also found that, because the petitioner, who continued to reside in Massachusetts since the respondent left in 1931, did not appear or take part in the Nevada di-

vorce proceedings, and was served by substituted service in Massachusetts, the jurisdiction of the State of Nevada to grant the divorce therefore depended upon the husband (respondent in this case) having acquired a domicile in Nevada; and that the petitioner could attack the Nevada decree by showing that the husband had not acquired in fact a domicile in Nevada; that she had made that attack but had been unsuccessful, since the trial judge found with ample and consistent subsidiary findings that on September 6, 1940, nearly ten months before the respondent herein filed his suit for divorce in Nevada, he had arrived at Reno with the intention of establishing his domicile there and so had acquired a domicile which he has since retained, and that this finding does not now appear to be challenged (R. 53).

The decree of the Supreme Judicial Court for the Commonwealth of Massachusetts affirming the decree of the Probate Court of Norfolk County, Commonwealth of Massachusetts, was entered on the *16th day of September, 1949*, and *not on September 19, 1949*, as stated in the petition (R. 1, 2).

The record page numbers referred to in the petition are those of the transcript of the record filed in the Supreme Judicial Court for the Commonwealth of Massachusetts and are in a number of instances different from the page numbers of the transcript of the record of this Court. We therefore note the following corrections:

Petition, Page 2—Rec. pp. 8-24, should be Rec. pp. 7-26; Rec. p. 3, should be Rec. p. 2.

Page 3—Rec. p. 52, should be Rec. p. 51; Rec. pp. 8, 9, should be Rec. p. 8.

Page 4—Rec. p. 12, should be Rec. p. 11.

Page 5—Rec. p. 14, should be Rec. p. 13; Rec. pp. 23, 24, should be Rec. pp. 24, 25.

Argument.

Attention is called to the fact that this petition "prays that a writ of certiorari issue to review the decree of the Supreme Judicial Court of the Commonwealth of Massachusetts," whereas under the local (Massachusetts) practice it should be directed to the Probate Court for Norfolk County, Commonwealth of Massachusetts.

JURISDICTION.

Before considering the petition for writ of certiorari on its merits, we respectfully call to the attention of the Court that the petition has not been brought within the ninety-day period, as provided for in Section 237 of the United States Code as amended, Title 28, Section 2101, under which the jurisdiction of this Court is invoked, and should therefore be denied.

Section 237 U.S. Code as amended, Title 28, Section 2101(c), provides as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

No application for additional time has been requested or granted. The order of the Supreme Judicial Court for the Commonwealth of Massachusetts incorporated in its rescript was entered on the *16th day of September, 1949* (R. 56); and on the same day, to wit, September 16, 1949, the rescript was transmitted by the Clerk of the Supreme

Judicial Court to the Probate Court for the County of Norfolk, as appears by the following certified copy of the rescript and certified copy of the certificate of the Clerk of the Supreme Judicial Court, the originals of which have been filed with the Clerk of this Court by the respondent (see also the same date at the head of the opinion of the Supreme Judicial Court—R. 52):

"COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
AT BOSTON, September 16, 1949.

In the case of

ROSE W. SHAIN

vs.

MARK SHAIN

pending in the Probate Court for the County of Norfolk

Ordered, that the register of probate and insolvency in said county make the following entry under said case in the docket of said court; viz.,—

Decree affirmed.

By the court,

WALTER F. FREDERICK, Clerk.

September 16, 1949.

Brief statement of the grounds and reasons of the decision. See opinion on file.

A true copy,

Attest: WALTER F. FREDERICK

Clerk."

"Office of Clerk of the
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
1412 Court House, Boston 8

Walter F. Frederick
Clerk

Telephone
CA 7-0351

I, Walter F. Frederick, Clerk of the Supreme Judicial Court for the Commonwealth, hereby certify that the case Rose M. Shain, of Brookline in the County of Norfolk, against Mark Shain of Boston in the County of Suffolk, was presented before said court on May 3, 1949 and on September 16, 1949, a rescript therein was transmitted to the Probate Court for the County of Norfolk, a copy of which is hereto annexed.
In witness whereof I have hereunto set my hand and the seal of said Supreme Judicial Court this third day of January A.D. 1950.

WALTER F. FREDERICK
Clerk."

[Seal]

The date (September 19, 1949) appearing on the certified copy of the Probate Court for the County of Norfolk, attested to by Edgar W. Stiles, Assistant Register of that Court (R. 57), is the date when the rescript from the Supreme Judicial Court for the Commonwealth of Massachusetts was filed in the Probate Court for that county and the date when an entry was made on the docket of the Probate Court for Norfolk County that the decree had been affirmed by the Supreme Judicial Court for the Commonwealth of Massachusetts (R. 57). It is not the date of the rescript, which, as stated above, was September 16, 1949.

Ninety days from September 16, 1949 (the time provided for by U.S. Code, Title 28, Section 2101, *supra*), in which

the application for a writ of certiorari must be made, expired on Thursday, *December 15, 1949*. The petition was applied for on Saturday, *December 17, 1949*.

The petition having been applied for on December 17, 1949, ninety-two days after the entry of the rescript in the Supreme Judicial Court for the Commonwealth of Massachusetts affirming the decree of the Probate Court for the County of Norfolk, must therefore be denied, as it was not applied for within ninety days after the entry of the rescript in the Supreme Judicial Court for the Commonwealth of Massachusetts.

Gorman v. *Washington University*, 316 U.S. 98, 101.
Department of Banking of Nebraska v. *Pink*, 317 U.S. 264, 268.
Monks v. *Lee*, 317 U.S. 590.
Bunn v. *Atlanta*, 317 U.S. 666.
Matton Steamboat Co., Inc., v. *Murphy*, 319 U.S. 412.
Cole v. *Violette*, 319 U.S. 581, 582.

The question for the decision of the Court in the *Cole* case (*supra*) was whether the appeal was applied for within the three months' (now ninety days') period provided by law. This Court said:

> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript as the 'final decree' in the case. . . . But in determining what is a final judgment or decree within the meaning of § 237 of the Judicial Code, 28 U.S.C. § 344, we are not controlled by the designation applied to it in state practice. . . . The order of the Supreme Judicial Court of Massachusetts

incorporated in its rescript was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial Court."

The appeal was dismissed on the ground that it was not applied for within the time provided by law.

In the case of *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 268, this Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact finally adjudicated rights and that that adjudication is not subject to further review by a state court. . . . Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months [now 90 days] from the date when the finality of the judgment for purposes of review is established. . . . The petition for certiorari in this case must be denied for want of jurisdiction."

In the case of *Matton Steamboat Co., Inc.*, v. *Murphy, supra*, within three months after the judgment of the New York Court of Appeals the appellant made timely application for the allowance of an appeal to the Chief Judge of the New York Court of Appeals, who denied the same shortly after the expiration of the three months' (now

ninety days') period. On application to an Associate Justice of this Court, made shortly after the three months (now ninety days) expired, the appeals were allowed by him with the Court's approval in order that the Court might resolve the unsettled question of its practice.

The Court said:

> "By Rule 36 of our Rules, appeal to this Court from a state court of last resort may be allowed 'by the chief justice or presiding judge of the state court, or by a justice of this court.' But such an appeal may not be allowed when no application is made to the judge or justice authorized to allow it within the period prescribed by the statute. . . . The time within which such applications could be made is that prescribed by the statute. Its language is peremptory—'no appeal . . . shall be allowed or entertained unless application therefor be duly made within three months [now 90 days]. The purport of the words is that the appeal allowed must be one that is applied for within the three months [now 90 days] period. An application which has been made within that period and denied does not satisfy that requirement, nor does a later application filed after the time has expired even though it be allowed."

The burden to show affirmatively that this Court has jurisdiction upon application for review of a judgment of a State Court is upon the petitioner.

> *Gorman* v. *Washington University*, 316 U.S. 98, 101 (*supra*).

The application for the issuance of the writ of certiorari, not having been applied for within the ninety days' period provided by law, must be denied.

RESPONDENT NOT AN INHABITANT OF MASSACHUSETTS AT TIME HE WENT TO NEVADA.

The petitioner cannot under Massachusetts Law, G.L. (Ter. Ed.) Chapter 208, Section 39, question the validity of the Nevada divorce.

The respondent Shain definitely established a domicile in New York City during the year 1931, where he lived until 1938 (R. 10).

On December 19, 1931, when the petitioner's petition for separate support was filed in Suffolk County Probate Court, the respondent had already established a domicile in New York City which existed from September 1931 to 1938 (R. 10). That he never reacquired a Massachusetts domicile from the time he left in 1931 to the present time is shown by other findings in the Report of Material Facts. Thus it appears that he left New York City in 1938 because of ill health and established a residence in Florida, which existed from 1938 to 1940 (R. 11), and that on September 6, 1940, he had established a residence in Reno, Nevada, in "good faith," had not acquired a new domicile anywhere else since, and had a right on July 2, 1941, to file a complaint in the State of Nevada (R. 23, 24).

Massachusetts General Laws (Ter. Ed.) Chapter 208, Section 39, is as follows:

> "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

If the conditions recited in the first clause of this statute have been fulfilled, then Shain's divorce is valid. Under the second clause his divorce would be invalid in Massachusetts only if he was (1) an inhabitant of the Commonwealth of Massachusetts, who (2) went to Nevada to obtain a divorce, for (3) a cause occurring in Massachusetts while the parties resided in Massachusetts, or (4) for a cause which would not authorize a divorce by the laws of the Commonwealth of Massachusetts. The phrases numbered (2), (3) and (4) refer to and modify phrase (1) and are applicable only to an "inhabitant of the Commonwealth of Massachusetts."

(The finding in the report of facts (R. 24) that "on September 6, 1940 Shain had given up his domicile in Massachusetts, New York and Florida" does not mean that he was domiciled in Massachusetts up to that date. It means that "by" that date his Massachusetts domicile had been abandoned, because the actual establishment of a domicile in New York had been effected "during the year 1931, where he lived until 1938" (R. 10).)

An "inhabitant" means more than a resident, and imports domicile.

Heard v. *Heard,* 323 Mass. 357, 370.
Glass v. *Glass,* 260 Mass. 562, 565, and cases cited.

Retaining a telephone number or a mail-forwarding address, or occasional visits to parents or on business, would be wholly insufficient to constitute domicile, which "implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."

Williams v. *North Carolina,* 325 U.S. 226, 229.

The respondent testified, in the Nevada proceedings, that he maintained a Boston address and telephone directory listing as a member of the bar because his wife and her family spread a rumor that he had been disbarred (R. 44); and the Probate Judge found that he did not want to disclose to his family his actual "whereabouts" (R. 18, par. 4).

The respondent, having established a domicile first in New York in 1931, then in Florida, and finally in Nevada, cannot be said to have been an inhabitant of the Commonwealth of Massachusetts when he procured the divorce in Nevada, and it follows that the first part of the Massachusetts statute is applicable to him, and not the second part. The courts of the Commonwealth of Massachusetts could not enter a decree binding him personally and would have no power to order money payments unless he had been served with process *within* the Commonwealth of Massachusetts, although they would retain jurisdiction to determine the custody of minor children—a moot point in this case as all of the children were of full age before the trial in the Probate Court (R. 1, 9, par. 7).

Mosher v. *Mosher,* 293 Mass. 105.
Schmidt v. *Schmidt,* 280 Mass. 216, 220, 221 (overruling *Blackinton* v. *Blackinton,* 141 Mass. 432, 436).

GROUNDS FOR THE PRESENT PETITION.

The petition is based on the proposition that the Supreme Judicial Court for the Commonwealth of Massachusetts erred in upholding the finding of the Probate Court for the County of Norfolk to the effect that the Nevada divorce granted the respondent was valid, because (1) at the time the respondent brought his divorce proceedings he had not established and acquired a domicile in Reno for

a time sufficient to meet the minimum requirement of the Nevada statutes relative to divorce, and (2) the petitioner herein was served by constructive service, to wit, in person, in Massachusetts, and did not appear at the divorce proceedings in Nevada.

Validity of the Nevada Divorce.

(1) We respectfully urge that the Court did not err in holding that at the time the respondent brought his divorce proceedings he had established and acquired a domicile in Reno for a time sufficient to meet the minimum requirements of the Nevada statutes relative to divorce.

The pertinent Nevada statutes are:

3 Nevada Compiled Laws (Supp.) 1929, Sec. 6405.

2 Nevada Compiled Laws (Supp.) 1931-1941, Sec. 9460.

Sec. 6405 "Legal residence defined—proviso

"The legal residence of a person with reference to his or her right of suffrage, eligibility to office, right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, is that place where he or she shall have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him or her; *provided, however* should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence."

Sec. 9460 "SIX WEEKS RESIDENCE—CAUSES FOR DIVORCE

"Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following cause, or any other causes provided by law:" (The causes are (1) impotency, (2) adultery, (3) desertion, (4) conviction of felony, (5) drunkenness, (6) cruelty, (7) neglect to provide and (8) insanity). (Effective May 1, 1931.)

Sec. 9467.06 In 1939 section 9460 was amended by section 9467.06 by adding the following cause of divorce:

"When the husband and wife live separate and apart for three consecutive years, without cohabitation, the court may in its discretion grant an absolute divorce at the suit of either party."

In section 9460, clause 8 (insanity), there is the following proviso:

"Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant a divorce unless either the plaintiff or defendant shall have been resident of the state for a period of not less than six weeks preceding the commencement of the action."

The trial judge found, to quote the opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (R. 53), "with ample and consistent subsidiary findings, that on September 6, 1940, nearly ten (10) months before the respondent filed his suit for divorce in Nevada, he had arrived at Reno with the intention of establishing his domicile there and so had acquired a domicile which he has since retained. This finding does not appear to be challenged."

The record is replete with testimony which amply warranted such a finding on the part of the trial judge (R. 7-52).

3 Nevada Compiled Laws (Supp.) 1929, Sec. 6405, *supra*, provides:

> "however, should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay to continue his residence, the time of such absence should not be considered in determining such residence."

The Probate Judge found as a fact that "Shain's [respondent's] health was poor and he had been advised to seek a warm climate. I am satisfied from all the evidence that Shain [respondent] had traveled since November 1, 1940, to improve his health, notwithstanding medical advice not to travel extensively. Shain [respondent] is desperately trying to recover good health" (R. 14). Shain's (respondent's) absence from Reno between November 1, 1940, and June 18, 1941, "was expedient" and on and after November 1, 1940, Shain (respondent) intended in "good faith" to return to Reno without delay and to continue his residence therein. "The Nevada judge so concluded. Shain [respondent] has continued his residence in Reno until the present" (R. 24).

Fleming v. *Fleming,* 36 Nev. 135. In this case it was said:

> "The first part of the statute of 1911 made actual, physical and corporeal presence necessary during all of the period for which residence is claimed; hence we think it was not the intention of the legislature to vary or modify that provision, but, on the other hand, in our judgment the legislative department by the proviso made provision for one who by urgent necessity was called from the jurisdiction of his residence, or who absented himself with the intention of returning without delay, or who returned without delay or as soon as the urgency had terminated."

In *Lamb* v. *Lamb,* 57 Nev. 421, 433, the Court held that—

> "the necessity of the physical presence of the plaintiff in Nevada and of the continuity of the six (6) weeks' period was passed upon by the Nevada Supreme Court which approved the following instructions to a jury:
>
> " 'The jury are instructed that where, in a divorce case, jurisdiction to grant a divorce is predicated upon the residence of the plaintiff, an essential element of that jurisdiction is that the plaintiff shall have been actually, physically and corporeally present, within the State of Nevada for a period of not less than six weeks preceding the commencement of the action; *but this period of six weeks need not be continuous.* If, after such presence within the State of Nevada, for a portion of six weeks, you find that the plaintiff absented himself from the State a short time with the intention in good faith to return without delay and continue his residence and thereafter did so return and thereafter continued such presence within the

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> State for such a time that the two periods of such presence aggregated preceding the commencement of this action a total of at least six weeks, then as a matter of law, the plaintiff was actually, physically and corporeally present within the State of Nevada, for a period of not less than six weeks preceding the commencement of the action'." (Italics ours.)

The Supreme Judicial Court for the Commonwealth of Massachusetts in dealing with this phase of the petitioner's appeal said (R. 55, 56):

> "In the present case we have an affirmative finding of intention in good faith to return without delay. It would seem that the words 'without delay' must be construed with considerable flexibility and with some reference to the reasons for absence. One in search of health might actually 'absent himself' for considerable periods and still entertain an 'intention in good faith to return without delay.'"

(2) The petitioner herein was served by constructive service, to wit, in person, in Massachusetts.

> "Article 4, Section 1, of the Constitution of the United States,"* to quote the language of this Court in the case of *Williams* v. *North Carolina,* 317 U.S. 287, at 293, "not only directs that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State' but also provides that 'Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.'

*Set forth on page 8 of the petition for writ of certiorari of the petitioner.

> Congress has exercised that power. By the Act of May 26, 1790, c. 11, 28 U. S. C. 687, Congress has provided that judgments 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' "

In *Davis* v. *Davis,* 305 U.S. 32, 40, this Court stated that Art. IV, Section 1, in the Act of May 26, 1790, requires that "not some" but "full" faith and credit be given judgments of a state Court.

The question of the validity of a divorce in which service on the libellee is made by constructive or substituted service and where such libellee does not appear has been passed upon by this Court on numerous occasions.

Full faith and credit must be given a decree of divorce granted by the state of matrimonial domicile on constructive service against the other spouse who was a non-resident of that state.

Atherton v. *Atherton,* 181 U.S. 155.

A divorce decree by one state based on a finding that one spouse was *bona fide* domiciled in that state is entitled to full faith and credit even though the other spouse was a non-resident of that state, had been served by substituted service and did not appear in the divorce proceedings in that state.

Williams v. *North Carolina,* 317 U.S. 287.

In arriving at this decision in the *Williams* case the Court overruled the case of *Haddock* v. *Haddock,* 201 U.S. 562, and at pages 294, 295, said:

> "So far as *judgments* are concerned, the decisions, as distinguished from dicta, show that the actual ex-

> ceptions have been few and far between, apart from *Haddock* v. *Haddock*. For this Court has been reluctant to admit exceptions in case of *judgments* rendered by the courts of a sister state, since the 'very purpose' of Art. IV, § 1 was 'to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.' "

We can see no reason for a reversal of the decision of this Court in the *Williams* v. *North Carolina* case, *supra*, and for a return to the rule as laid down in the *Haddock* v. *Haddock* case, *supra*.

The jurisdiction of the State of Nevada to grant the divorce depended, therefore, upon the respondent having acquired a domicile in Nevada.

Williams v. *North Carolina*, 325 U.S. 226.

In that case this Court held that a decree of divorce rendered in one court may be collaterally impeached in another by proof that the Court which rendered the decree had no jurisdiction even though the records of the proceedings of that Court purport to show jurisdiction, and held further that the decision of the Court in the first *Williams* v. *North Carolina* case did not foreclose a second trial upon the issue of domicile.

The contention of the petitioner that, even if the Court was to assume that constructive service on the petitioner would be due process, the Reno decree would still be invalid under the rule laid down in the second *Williams* case is unsound in that she bases her contention upon the assumption that the respondent had not acquired a domicile in Nevada and did not even comply with the residential re-

quirements, to wit, six weeks' residence in the State of Nevada before commencing his suit for divorce. This assumption is erroneous and is contrary to the finding of the Probate Judge as contained in the Report of Material Facts (R. 7-51), and the finding of the Supreme Judicial Court of Massachusetts (R. 55, 56).

We do not question that in accordance with the decision of this Court in the case of *Williams* v. *North Carolina,* 325 U.S. 226, the wife (petitioner) had a right to attack the validity of the Nevada decree by attempting to show that the husband (respondent) has not acquired in fact a domicile in Nevada. This she tried to do in the proceeding in the Norfolk County Probate Court, but was unsuccessful, since the Probate Judge, to quote the language of the Supreme Judicial Court of the Commonwealth of Massachusetts, has found (R. 53) "with ample and subsidiary findings that, on September 6, 1940, nearly 10 months before the husband filed his suit for divorce in Nevada, he had arrived in Reno with the intention of establishing his domicile there, and so had acquired a domicile which he has since retained."

Jurisdiction to grant a divorce may—indeed must—be based on a domicile of at least one of the parties.

> *Bell* v. *Bell,* 181 U.S. 175.
> *Bowditch* v. *Bowditch,* 314 Mass. 410, 414.

Schouler in his Divorce Manual expresses this rule as follows:

> "Under present decisions of the United States Supreme Court there can now be no question but that the husband has the right to change his domicile and acquire one in another state where he can obtain a valid divorce that must be recognized in the other states, if in making that change he acquired a bona fide domi-

cile, in that state to which he removes. This is so even though he leaves his wife without any right. It was so held in the first Williams decision. There is nothing in the second Williams decision to change that ruling. Indeed it seems to reiterate it."

Schouler's Divorce Manual (1945 Supp.), Sec. 31 (p. 51).
Williams v. *North Carolina,* 317 U.S. 287.
Williams v. *North Carolina,* 325 U.S. 226.

And where the defendant is a non-resident, Schouler has the following comment:

"In most of the states the fact that the defendant is not a resident will not prevent the court from taking jurisdiction. There are some exceptions to this rule. For example, in Utah it was held under the pertinent statute that it was essential that service be made upon the defendant within the territorial jurisdiction of the court where the divorce was sought on the ground of permanent insanity. With these few exceptions, however, in the absence of a statute to the contrary the plaintiff may obtain a divorce in the state of his or her domicile, particularly where this is the state of the matrimonial domicile, even though the defendant is a non-resident. This is so even though personal service within the state cannot be made on the defendant, but constructive service by publication or service without the state is necessary."

Schouler's Divorce Manual (Warren, 1944), Sec. 25 D, citing—
Minick v. *Minick* (1933), 111 Fla. 469.
Saul v. *Saul* (1941), 74 App. D.C. 287, 122 F. (2d) 64.

The question of domicile in the instant case is one of fact. This Court will not review findings of fact by a trial Court.

Since the decision of the Supreme Judicial Court of Massachusetts was based solely upon findings of fact made by the lower Court, it would not seem to be an appropriate proceeding for certiorari to review the decision of that Court. Subdivision 5 of Rule 38 of this Court provides for certain rules which, while not controlling nor fully measuring the Court's discretion, show the character of the reasons which will be considered for the issuance of the writ. Subdivision (*a*) of that paragraph provides:

> ". . . where a state court has decided a federal question of substance not theretofore determined by this court or has decided it in a way probably not in accord with applicable decisions of this court."

In *Deputy* v. *Du Pont,* 308 U.S. 488, Mr. Justice Roberts said:

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of reëxamining the correctness of the result."

It is quite apparent from a reading of the decision of the Supreme Judicial Court of Massachusetts that this case involves no important principle of law and no conflict of decisions among either state or federal courts, and that the writ is brought "for the mere purpose of re-examining the correctness" of the decision of the Supreme Judicial Court of Massachusetts. Since that decision was founded solely upon specific findings of fact by the Probate Court and did not deny full faith and credit to the Nevada decree, there is no substantial federal question not previously determined by the Court, nor did the Supreme Judicial Court of Massachusetts decide the case in a way not in accord with applicable decisions of this Court. It is obvious that the purpose of the petition in this case would be merely to ask the Court to review the correctness of the findings of the trial Court.

Conclusion.

It is respectfully submitted (1) that the petition for writ of certiorari was not applied for within the ninety days' period, as provided for in the United States Code, Title 28, Section 2101, and (2) that the Nevada Court had jurisdiction to grant the respondent a divorce and that the Supreme Judicial Court of Massachusetts was therefore obliged to give full faith and credit to the divorce decree of the Nevada Court. The petition must therefore be denied.

Respectfully submitted,

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